No. 16198

United States Court of Appeals

For the Ninth Circuit

JOHN ANDREAS,

Appellant,

vs.

LILLIAN R. HENDERSON, FRANCES UPCHURCH, JERRY NATHANSON, SAMUEL SONTAG and GEORGE GOLDBERG,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—12-19-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

WARREN E. SLAUGHTER,
THOMAS G. BAGGOT,
VAUGHAN, BRANDLIN & BAGGOT,
411 W. Fifth St.,
Los Angeles 13, California.

For Appellees:

IRL DAVIS BRETT,
JEROME L. RICHARDSON,
920 Rowan Building,
458 South Spring St.,
Los Angeles 13, California.

In the United States District Court, Southern District of California, Central Division

No. 20798-WB

JOHN ANDREAS,

Plaintiff,

vs.

JANE DOE HENDERSON, MARY ROE UPCHURCH, JERRY NATHANSON, SAMUEL SANTOG, GEORGE GOLDBERG, DOE ONE Through DOE TEN, Inclusive,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF AND TO QUIET TITLE

Plaintiff complains of defendants and for cause of action, alleges:

Jurisdiction

1. This action arises and these proceedings are instituted by plaintiff under Section 5 of the Act of January 12, 1891 (26 Stat. 712), to obtain redress for the plaintiff and a declaratory judgment in plaintiff's favor on account of a conveyance by the plaintiff, an Agua Caliente Indian, of certain lands set apart and allocated under the above cited statute during the trust period provided by such statute under the provisions of said statute, making such conveyance absolutely null and void.

Venue

2. Defendants reside, transact business and are found [2*] within the Central Division of the Southern District of California. The alleged violations of law hereinafter described have been and are being carried out in part within the said Central Division of California.

Parties

3. Plaintiff is now and at all times herein mentioned was an Agua Caliente Indian of the present age of approximately eighty (80) years, with his place of residence in the County of Riverside, State of California, in the area heretofore known as the Palm Springs Reservation.

4. Defendants are now and at all times herein mentioned were residents of the County of Riverside, State of California.

5. The true names or capacities, whether individual, corporate, associate or otherwise, of defendants Doe One through Doe Ten, inclusive, are unknown to plaintiff who therefore sues said defendants by such fictitious names, and will ask leave to amend his complaint to show their true names and capacities when the same have been ascertained. The true names of defendants Jane Doe Henderson and Mary Roe Upchurch are unknown to plaintiff who therefore sues said defendants by such fictitious names and will ask leave to amend

*Page numbering appearing at foot of page of original Certified Transcript of Record.

his complaint to show their true names when the same have been ascertained.

6. On or about August 5, 1954, the defendants procured from plaintiff a conveyance (a copy of which is attached hereto marked Exhibit "A") whereby plaintiff purported to convey to the defendants that certain real property situate in the County of Riverside, State of California, and more particularly described as follows, to wit:

> "The South One-Half of the Northwest Quarter of the Northwest Quarter of Section 2, Township 4 South, Range 4 East, S. B. B. & M."

which said property is hereinafter referred to as the "subject [3] property."

7. During the year 1954 plaintiff made application to the United States Government for the allocation to him of the subject property and the subject property was thereafter, to wit: on September 14, 1954, allocated to the plaintiff by fee patent dated September 4, 1954, from the United States of America, which said patent was recorded in Book 1671, Page 543, Records of Riverside County, California.

8. The subject property is located on the "Palm Springs Reservation" as said reservation was defined under the Mission Indian Act hereinabove cited as the Act of January 12, 1891 (26 Stat. 712).

9. That an actual controversy exists between plaintiff and defendants and each of them as to whether or not the aforesaid conveyance from plaintiff to defendants is null and void.

10. Plaintiff asserts that the said conveyance is null and void for the reason that it conveys land set apart and allotted under the above cited statute of the United States and that said conveyance was made by plaintiff before the expiration of the trust period provided under the said act.

11. The defendants assert that the said conveyance is valid.

12. That at all times herein mentioned, the defendants Jane Doe Henderson and Mary Roe Upchurch were and are the agents, employees and representatives of the remaining defendants and that all acts of the said defendants Henderson and Upchurch were authorized by all of the remaining defendants and were and are the acts of each and all of the defendants herein.

As a Second, Separate and Complete Cause of Action, Plaintiff Alleges as Follows:

1. The plaintiff is the beneficial owner of the certain [4] real property situate in the County of Riverside, State of California, more particularly described as follows:

> "The South One-Half of the Northwest Quarter of the Northwest Quarter of Section 2, Township 4 South, Range 4 East, S. B. B. & M."

2. That defendants claim some right, title or interest in and to the aforesaid property.

3. That defendants' claims are without right and

defendants have no right, title or interest in said property.

Wherefore, plaintiff prays:

1. That the Court declare the rights of the plaintiff and defendants under the aforesaid conveyance and in and to the subject property.

2. That the Court enter judgment quieting plaintiff's beneficial title in and to the subject property and enjoin defendants from asserting any right, title or interest therein.

3. For such other and further relief as to the Court may seem just and proper.

WARREN E. SLAUGHTER,
VAUGHAN, BRANDLIN &
BAGGOT,

By /s/ J. M. BRANDLIN,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed December 5, 1956. [5]

[Title of District Court and Cause.]

REPLY TO AMENDED COUNTER CLAIM— ANSWER TO AMENDED CROSS-CLAIM— DEMAND FOR JURY TRIAL UPON FACTUAL ISSUES

Comes Now plaintiff John Andreas and answering defendants George E. Goldberg, Jerry Nathanson and Samuel Sontag Amended Counterclaim (so

denominated in its caption) or cross-claim (so denomiated in its body) and admits and denies as follows:

1. Admits the allegations of paragraph 2.

2. Denies the allegations of paragraph 3.

3. Answering paragraph 1, admits as follows:

(a) The allegations commencing on page 2, line 15 and ending with the numerals "3360" on page 3, line 3;

(b) The total consideration for the property was to be $20,000.00 payable $5,000.00 through escrow and $15,000.00 by note secured by trust deed payable in annual installments of $3,000.00 with interest at 5% per year;

(c) Plaintiff executed and acknowledged the grant deed which is attached as Exhibit "A" to the Amended [8] Answer and Counterclaim and placed said deed in escrow;

(d) The allegations commencing on page 3, line 28 and ending with the word "Andreas" on page 4, line 4;

(e) On December 15, 1954, the escrow instructions were modified by the execution by plaintiff, Margaret Andreas and defendants Frances Upchurch and Lillian R. Henderson of the modification appearing on page 4, lines 10 to 15 of the Amended Answer and Counterclaim;

(f) The grant deed hereinabove referred to was recorded on December 21, 1954, in Book 1669, Page

69 of Official Records in the Office of the County Recorder of Riverside County, California;

(g) The allegations commencing on page 4, line 24 and ending on page 5, line 24.

Except as expressly admitted, denies generally and specifically each, every and all of the allegations incorporated therein.

Wherefore, plaintiff prays that defendants George E. Goldberg, Jerry Nathanson and Samuel Sontag take nothing by their amended counterclaim and cross-claim and that judgment be entered in accordance with the prayer of plaintiff's complaint.

WARREN E. SLAUGHTER,
VAUGHAN, BRANDLIN &
BAGGOT,

By /s/ THOMAS G. BAGGOT,
Attorneys for Plaintiff. [9]

Demand for Jury Trial

Plaintiff John Andreas hereby demands a jury trial upon all factual issues herein.

WARREN E. SLAUGHTER,
VAUGHAN, BRANDLIN &
BAGGOT,

By /s/ THOMAS G. BAGGOT,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 1, 1957.

[Title of District Court and Cause.]

STIPULATION AMENDING COMPLAINT

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that the plaintiff's complaint may be and the same hereby is amended nunc pro tunc in the following particulars only:

On page 2, line 27, delete "San Bernardino" and insert in lieu thereof "Riverside."

WARREN E. SLAUGHTER,
VAUGHAN, BRANDLIN &
BAGGOT,

By /s/ HENRY B. BRANDLIN,
Attorneys for Plaintiff.

IRL DAVIS BRETT &
JEROME B. RICHARDSON,

By /s/ IRL D. BRETT,
Attorneys for Defendants Lillian R. Henderson, Frances Upchurch, Jerry Nathanson, Samuel Santog and George Goldberg.

It is so ordered: Date 3-4, 1957.

/s/ WM. M. BYRNE,
Judge.

[Endorsed]: Filed March 4, 1957. [12]

[Title of District Court and Cause.]

SECOND AMENDED ANSWER AND COUNTERCLAIM

Come Now defendants Lillian R. Henderson (sued herein as Jane Doe Henderson), Frances Upchurch (sued herein as Mary Roe Upchurch), Jerry Nathanson, Samuel Santog and George Goldberg and leave of Court being first had and obtained, by way of their Second Amended Answer to plaintiff's complaint, as amended, admit, deny and allege as follows:

Second Amended Answer to First Cause of Action (Repetition From Existing Amended Answer)

1. Answering paragraph 5, deny that the true names of the defendants sued as Jane Doe Henderson and Mary Roe Upchurch are unknown to plaintiff and to the contrary allege that plaintiff has at all times known such true names to be Lillian R. Henderson and Frances Upchurch.

2. Answering paragraph 6, deny that defendants or either of them procured from plaintiff the conveyance (a copy of which is attached hereto and marked Exhibit "A") except in the manner as hereinafter alleged. Deny that the lands described on [13] page 2, paragraph 6, lines 29 to 31, inclusive, of the complaint are situated in the County of San Bernardino, State of California, and to the contrary allege that such real property has at all

times been and now is situated in the County of Riverside, State of California.

3. Admit the allegations contained in paragraph 7, except that they deny that the fee patent from the United States of America to plaintiff was dated September 4, 1954, and to the contrary allege that said fee patent was dated, executed and became effective on December 14, 1954.

4. Answering paragraph 8, admit that the real property which is the subject matter of this action is located within the Palm Springs Indian Reservation, except as so admitted, defendants deny the allegations contained in said paragraph 8.

5. Answering paragraph 12, deny each and every allegation therein.

6. Further answering paragraphs 1 to 12, inclusive, in plaintiff's first cause of action, these defendants allege:

That on or about July 29, 1954, plaintiff, John Andreas, whose full true name was and is John Joseph Andreas, was a trust patentee in severalty of the land situated in the County of Riverside, State of California and more particularly described as:

> "The South One-Half of the Northwest Quarter of the Northwest Quarter of Section 2, Township 4 South, Range 4 East, S. B. B. & M."

That such lands had been allotted by the United States of America to said John Joseph Andreas

under the General Allotment Act (24 Stat. 388, et seq., codified as 25 U.S.C., 331 et seq.) and the provisions of the Mission Indian Act (28 Stat. 712 et seq.) and on July 7, 1954, the United States of America by and through the Bureau of Land Management had executed and issued to him a trust patent No. 1145356. [14]

That on or about July 29, 1954, plaintiff, using the name of John Andreas, and Margaret Andreas, his wife, as sellers, and defendants Frances Upchurch, a single woman, and Lillian R. Henderson, a married woman, as buyers, each to the extent of an undivided one-half (½) interest therein entered into a written escrow with the Palm Springs Branch of the Citizens National Trust and Savings Bank being numbered 3360 by the terms of which it was provided, inter alia, that when and if plaintiff obtained a fee simple patent to said lands from the United States of America, he would sell and convey the same to said buyers for a total consideration of $20,000.00 of which $5,000.00 in cash would be paid through escrow and the balance of $15,000.00 would be represented by a promissory note payable in annual installments of $3,000.00 or more, together with interest at 5% per annum, secured by a first trust deed upon such real property. That by the terms and provisions of said escrowing instructions the escrow holder became the agent of the plaintiff as seller to receive and hold the deed of conveyance until authorized to deliver the same to the buyers and it was further provided that such delivery be made as follows:

"Close of escrow will be when the fee patent to the seller and the grant deed from seller to the above vestees are recorded."

That following the execution of such escrow instructions the grant deed, a true copy of which is annexed to the complaint and marked Exhibit "A," and which these answering defendants by such reference incorporate herein as if herein set out in full, was prepared, signed by the plaintiff on August 2, 1954, acknowledged by the plaintiff before a Notary Public of Riverside County on August 5, 1954, and thereafter delivered by the plaintiff into said escrow and held by said escrow, as his agent, and without any delivery until December 16, 1954.

That on or about July 29, 1954 (the exact date being [15] unknown to these answering defendants) plaintiff made application to the United States Government for a fee patent to said real property and on December 14, 1954, the United States of America by and through the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476) executed and issued a fee simple patent No. 1148458 to said lands and other lands within the Palm Springs Reservation to plaintiff under his full name of John Joseph Andreas, that following notice thereof to plaintiff and to defendants Frances Upchurch and Lillian R. Henderson, the parties to said escrow No. 3360 entered into a written modification and supplement to the original escrow instructions which amended instructions were signed by the plaintiff,

Margaret Andreas, his wife, and the two buyers, Upchurch and Henderson, by the terms of which the escrow was instructed as follows:

> "You are hereby authorized and instructed to record the grant deed in your escrow #3360 upon execution of these amended escrow instructions. You are instructed to continue to hold this escrow open until the fee patent is placed in escrow.
>
> "You are further authorized and instructed to pay the sum of $500.00 from funds you hold in above escrow, to John Andreas, upon execution of these amended escrow instructions."

That following the execution of said amended escrow instructions, a deed, a true copy of which is annexed to the complaint and marked as Exhibit "A," was forwarded to Riverside, California, by the Escrow Officer as agent of plaintiff for recording by the County Recorder of said County and was recorded on December 21, 1954, as Document No. 66890 in Book 1669 at page 69 of Official Records in said office.

That immediately following the recording of said deed there was recorded a trust deed upon said real property executed by Frances Upchurch and Lillian R. Henderson as trustors in favor of plaintiff as beneficiary to secure a promissory note in the original principal sum of $15,000.00. That said trust deed was recorded December 21, 1954, as Document No. 66892 in Book 1669 at page 67 of [67] Official

Records in the Office of the County Recorder of Riverside County. That said promissory note has been paid to plaintiff except to the extent of $9,-094.33 which sum has been deposited with said Bank by defendants and has been tendered to plaintiff and is available to fully satisfy and discharge the lien of said trustee.

That on October 3, 1956, Frances Upchurch, a single woman, and Lillian R. Henderson, a married woman, executed a grant deed to the above described real property to George E. Goldberg, an unmarried man, that said grant deed was acknowledged by the grantors before a Notary Public of Riverside County and was recorded on October 10, 1956, as document No. 70072 in Book 1983 at page 520 of Official Records in the office of the County Recorder of Riverside County.

That on October 4, 1956, George E. Goldberg, an unmarried man, executed a grant deed to the above-described real property to the extent of a two-thirds (⅔) interest therein as follows: To Jerry Nathanson, an unmarried man, an undivided one-third (⅓) interest; to Samuel Sontag, an unmarried man, an undivided one-third (⅓) interest. That said grant deed was acknowledged by the grantor before a Notary Public of Riverside County and was recorded as instrument No. 70073 on October 10, 1956, in Book 1983 at page 519 of Official Records in the office of the County Recorder of Riverside County.

That since October 4, 1956, defendants Frances Upchurch and Lillian R. Henderson, and each of them, have had no right, title or interest in or to the lands which are the subject matter of this action and they and each of them expressly disclaim any right, title or interest therein.

That since October 4, 1956, the fee simple title to the lands which are the subject matter of this action have been and are vested in defendants George E. Goldberg, an unmarried man, as to an undivided one-third (⅓) interest therein; Jerry Nathanson, an [17] unmarried man, as to an undivided one-third (⅓) interest therein; and Samuel Sontag, an unmarried man, as to an undivided one-third (⅓) interest therein. All subject to the first trust deed aforesaid to secure a promissory note, the unpaid balance of which is $9,094.33.

7. That all conveyances hereinabove referred to and described were and are valid and conveyed the interest and title described in each of them from the person or persons described therein as sellers to the person or persons described therein as purchasers and that since December 16, 1954 (date of the delivery of the deed, a true copy of which is annexed to the complaint as Exhibit "A"), plaintiff has had no right, title or interest in or to said premises, excepting his rights under the note and trust deed aforesaid.

Second Amended Answer to Second Cause of Action
(Repetition From Exising Amended Answer)

1. Defendants refer to paragraphs 1-7, inclusive, of their answer to the first cause of action and by such reference replead the same as if herein set out in full.

2. Answering paragraph 1 of the second cause of action, defendants deny each and every allegation therein.

3. Answering paragraphs 2 and 3 of the second cause of action, defendants admit and allege that defendants George E. Goldberg, Jerry Nathanson and Samuel Sontag claim to be and are the owners in fee simple of an undivided one-third (⅓) interest each in and to the lands described in paragraph 1 of the second cause of action and further allege that plaintiff has no right, title or interest therein excepting his rights in the first trust deed thereon securing an unpaid balance of $9,094.33 and no [18] more.

* * *

Cross-Claim

(Repetition From Existing Amended Answer)

1. Come now the defendants George E. Goldberg, Jerry Nathanson and Samuel Sontag and each of them and by way of a cross-claim against plaintiff John Andreas refer to and by such reference reallege herein as if herein set out in full all of the allegations set forth in paragraphs 6 and 7 of their

answer to paintiff's first cause of action commencing on page 2, line 17 and ending on page 6, line 14.

2. That plaintiff John Andreas claims some right, title or interest in and to said real property.

3. That the claim of said plaintiff John Andreas is without right and said plaintiff has no right, title or interest therein save and except to the extent of his interest as beneficiary in the trust deed which was recorded on December 21, 1954, as document No. 66892 in Book 1669 at page 67 of Official Records in the Office of the County Recorder of Riverside County and to the extent of securing an unpaid balance of $9,094.33 upon the promissory note secured by such trustee. [25]

Wherefore Defendants Pray:

1. That the Court declare the rights of plaintiff and of these answering defendants under the instrument of conveyance described and set forth in the complaint and this answer and cross-claim and to the real property described therein.

2. That the Court enter judgment quieting title in person or persons which the Court finds to be entitled thereto, and directing that plaintiff accept and receive full satisfaction of said note and trust deed and that the lien of such trust deed be extinguished of record and that plaintiff John Andreas, also known as John Joseph Andreas, his agents, attorneys, executors, administrators, assigns and successors in interest (other than these answering defendants and cross-claimants) be enjoined

and debarred for all time from asserting any right, title or interest therein.

3. For their costs of suit herein incurred and such other and general relief as to the Court may seem just and proper.

IRL DAVIS BRETT &
JEROME L. RICHARDSON,

By /s/ IRL D. BRETT,
Attorneys for Defendants.

Statement of Counsel

In view of the fact that by the order made by this Court on September 23, 1957, defendants were permitted to prepare, serve and file this Second Amended Answer and Counterclaim only if they complied with the condition precedent fixed by this Honorable Court that such pleading must repeat verbatim the defenses and cross-claim as set forth in their existing Amended Answer and Counterclaim, which counsel for defendants have [26] hereinabove complied with and in view of the fact that Rule 11 F.R.C.P. provides, in effect, that the signature of counsel is a verification of such pleadings, and in view of the fact that since the filing of said Amended Answer and Counterclaim counsel for defendants has discovered that the unpaid balance of the trust deed upon subject property is $12,961.18 instead of the sum of $9,094.33 as originally recited in the Amended Answer and Counterclaim and repeated verbatim herein, counsel for defendants will, at the appropriate time and place request leave to

amend this pleading to comport with the truth as to such unpaid amount.

Dated: September 30, 1957.

IRL DAVIS BRETT &
JEROME L. RICHARDSON,

By /s/ IRL D. BRETT,
Attorneys for Defendants.

Certificate of Counsel for Plaintiff Attached.

[Endorsed]: Filed October 4, 1957. [27]

[Title of District Court and Cause.]

STIPULATION RE PLAINTIFF'S ANSWER TO COUNTERCLAIM AND ORDER PURSUANT TO SAID STIPULATION

It is hereby stipulated by and between plaintiff and defendants Lillian R. Henderson, Frances Upchurch, Jerry Nathanson, Samuel Santog, and George Goldberg, through their respective counsel, the undersigned, that the plaintiff's "Reply to Amended Counterclaim—Answer to Amended Cross-Claim" may be deemed to be plaintiff's Answer to Defendants' Counterclaim (so denominated in its caption) or Cross-Claim (so denominated in its body), set forth on page 13, lines 13 to 31 of said defendants' "Second Amended Answer and Counterclaim."

Dated: October 1, 1957.

WARREN E. SLAUGHTER,
ROBERT E. SCHLESINGER,
VAUGHAN, BRANDLIN &
BAGGOT,

By /s/ THOMAS G. BAGGOT,
Attorneys for Plaintiff.

JEROME L. RICHARDSON,
IRL DAVIS BRETT,

By /s/ IRL D. BRETT,
Attorneys for Defendants. [30]

Order

Pursuant to the above Stipulation, it is so ordered.
Dated: October 4, 1957.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed October 7, 1957. [31]

[Title of District Court and Cause.]

STIPULATION AS TO FACTS

Plaintiff and defendants, Lillian R. Henderson, Frances Upchurch, Jerry Nathanson, George E. Goldberg and Samuel Sontag, through their respective counsel, the undersigned, hereby conditionally stipulate that the following facts are true and correct and that the originals of the writings, copies or

photocopies of which are referred to in this stipulation are genuine and that each thereof was duly executed and signed or witnessed by the persons whose names appear thereon as having executed, approved or witnessed the same. The conditions under which this stipulation of facts is executed are as follows:

A. The stipulation and admission of each fact (whether evidenced by a writing or not) is deemed to be admitted as true, subject to the reservation by each of the parties hereto of any and all rights to object to the admission thereof or of any part thereof in evidence in this case upon any ground or grounds excepting that neither of the stipulating parties shall be entitled to controvert [32] the truth of the stipulated fact or that such writing or writings evidencing the same are not genuine and/or were not duly executed, approved or witnessed by the person or persons whose signatures appear thereon.

B. Plaintiff expressly reserves the objections to the facts which are hereafter listed as items Nos. 11 to 21, inclusive, as being incompetent, irrelevant and immaterial to any issues raised by the pleadings in this case and expressly objects to the receipt thereof or any part thereof in evidence and/or to the consideration thereof or any part thereof for any purpose.

C. That each party hereto expressly reserves the right to contend and to prove, if such proof be available and admitted by the court, that any one or

more of the hereinafter recited and stipulated facts (including the writings evidencing the same) is or are but a part of an entire act, declaration, conversation or writing constituting one integrated subject matter as defined by Section 1854 C.C.P.

Expressly subject to the foregoing, the parties hereto stipulate and agree that the following facts are true:

1. Plaintiff is an Indian and a member of the Agua Caliente band of Mission Indians commonly called the Palm Springs band.

2. On July 7, 1954, the United States of America executed and issued to plaintiff a trust patent, being No. 1145356, to the following described real property situated in the County of Riverside, State of California:

> The South one-half of the Northwest Quarter of the Northwest Quarter of Section 2, Township 4 South, Range 4 East, S. B. B. & M.

That a true copy of said trust patent is annexed hereto marked as Exhibit P-1 and by such reference, incorporated herein as if herein set out in full.

3. On July 29, 1954, plaintiff and defendants, Lillian [33] R. Henderson and Frances Upchurch, each signed and executed a writing in the form of written escrow instructions to the Palm Springs branch of Citizens National Trust & Savings Bank of Riverside, which escrow was identified by such

bank as its escrow No. 3360. That a true copy of such writing is identified as Exhibit "A" and is annexed to the Affidavit of Wilma Wilson, dated January 8, 1957, which has heretofore been filed in this case.

4. Defendant Lillian R. Henderson was at all times material herein, and now is, the wife of Benjamin Henderson. Benjamin Henderson is a member of the law firm of Benjamin Henderson and Jerome L. Richardson of Palm Springs, California, who at all times material herein were defendant Jerry Nathanson's attorneys. Jerome L. Richardson is counsel of record for all defendants herein. Defendant Frances Upchurch was at all times material herein, and now is, a legal secretary employed by said firm of Henderson and Richardson.

5. That the photocopy of the grant deed which is annexed to the original complaint and marked as Exhibit "A" is a true and correct copy of the original. That said original was signed by John Andreas on August 2, 1954. That said deed was delivered to the escrow holder in escrow 3360 on August 5, 1954. That said deed was mailed by the escrow holder to Land Title Company of Riverside County in the City of Riverside, California, on December 17, 1954, with directions that it be recorded and said original deed was recorded as document No. 66890 in book 1669 at page 69 of Official Records in the office of the County Recorder of Riverside County on December 21, 1954.

6. That there is annexed hereto and marked as Exhibit P-2 [34] a photocopy of a trust deed from Frances Upchurch and Lillian R. Henderson as trustors to Security Title Insurance Company, a California corporation, as trustee, for John Andreas, a married man, as beneficiary. That said photocopy is a true and correct copy of the original thereof. That the original thereof was signed by Frances Upchurch and Lillian R. Henderson on August 2, 1954, and was acknowledged before Wilma Wilson, a Notary Public for the County of Riverside, California on September 17, 1954. That it was delivered to the escrow holder in escrow No. 3360 on September 17, 1954, and was mailed by said escrow to Land Title Company of Riverside County, in Riverside, California, on December 17, 1954, with instructions to record the same. That it was recorded as instrument No. 66892 in book 1669 at page 67 of Official Records in the Office of the County Recorder of Riverside County on December 21, 1954.

7. That on December 14, 1954, the United States of America executed and issued to plaintiff a fee simple patent being No. 1148458. That the photocopy thereof which is marked Exhibit "A" and is annexed to the affidavit of Jules J. Brasseur dated January 4, 1957, and which was heretofore filed in this action is a true and correct copy of said fee simple patent. That said fee simple patent was deposited in escrow No. 3360 on December 28, 1954, and was mailed on the same day by said escrow to Land Title Company of Riverside County at River-

side, California, with instructions to record the same. That said fee simple patent was recorded in book 1671 at page 544 of Official Records in the office of the County Recorder of Riverside County on December 29, 1954.

8. On December 15, 1954, plaintiff and defendants Lillian R. Henderson and Frances Upchurch each signed amended escrow instructions in escrow No. 3360 which read as follows: [35]

"You are hereby authorized and instructed to record the grant deed in your escrow #3360 upon execution of these amended escrow instructions. You are instructed to continue to hold this escrow open until the fee patent is placed in escrow.

"You are further authorized and instructed to pay the sum of $500.00 from funds you hold in above escrow, to John Andreas, upon execution of these amended escrow instructions."

9. On October 3, 1956, Frances Upchurch, a single woman, and Lillian R. Henderson, a married woman, executed a grant deed to the above described real property to George E. Goldberg, an unmarried man. Said grant deed was acknowledged by the grantors before a notary public of Riverside County and was recorded on October 10, 1956, as document No. 70072 in book 1983 at page 520 of Official Records in the office of the County Recorder of Riverside County. That a true photocopy thereof is marked as Exhibit "B" and annexed to the affidavit

of Jules J. Brasseur dated January 4, 1954, which has heretofore been filed in this action.

10. On October 4, 1956, George E. Goldberg, an unmarried man, executed a grant deed to the above described real property to the extent of a two-thirds (⅔) interest therein as follows: To Jerry Nathanson, an unmarried man, an undivided one-third (⅓) interest; to Samuel Sontag, an unmarried man, an undivided one-third (⅓) interest. Said grant deed was acknowledged by the grantor before a notary public in Riverside County and was recorded as instrument No. 70073 on October 10, 1956, in book 1983, page 519 of Official Records in the office of the County Recorder of Riverside County. That a true photocopy thereof is marked as Exhibit "C" and annexed to the affidavit of Jules J. Brasseur dated [36] January 4, 1954, which has heretofore been filed in this action.

12. That on July 19, 1954, plaintiff executed the original application, entitled "Application for a Patent in Fee," consisting of five partially printed, partially typewritten and partially pen and ink inscribed sheets, true copies of which are identified as Exhibit 1, pages 1 to 5, inclusive, and annexed to the affidavit of Jerry Nathanson dated June 10, 1957, which has heretofore been filed in this action.

13. That on July 19, 1954 Ned Mitchell was the District Agent for the Palm Springs Indian Reservation and Mary B. Whitman was a clerk in his office.

14. That on July 19, 1954 said District Agent, Ned Mitchell, completed and executed the original written report [37] entitled "Superintendent's Report on Application for a Patent in Fee," consisting of five partially printed and partially typewritten sheets, true photocopies of which are identified as Exhibit 2, pages 1 to 5 inclusive, and annexed to said affidavit of Jerry Nathanson dated June 10, 1957.

15. That on July 19, 1954 said District Agent, Ned Mitchell, completed and executed the original "Certificate of Appraisement," a true copy of which is identified as Exhibit 4 and annexed to said affidavit of Jerry Nathanson dated June 10, 1957.

16. That at all times between July 7, 1954 and September 4, 1954, Leonard M. Hill was the duly appointed, qualified and acting Area Director of the Sacramento (California) Area Office of the Bureau of Indian Affairs, Department of the Interior and such area included the Palm Springs Indian Reservation. That during the same period of time Henry Harris Jr. was an Assistant Area Director under Mr. Hill.

17. That on September 3, 1954, Mr. Hill, acting in his capacity of Area Director, endorsed his approval upon page 3 of the "Superintendent's Report" made by Mr. Mitchell on July 19, 1954 as it appears on the photocopy of said page 3 of Exhibit 2 as annexed to the affidavit of Jerry Nathanson

dated June 10, 1957. That such endorsement read as follows:

"Approved:

"/s/ LEONARD M. HILL,
"LEONARD M. HILL,
"Area Director."

18. That on September 3, 1954, Mr. Hill, as such Area Director, signed the certificate which is the final paragraph of the certificate of appraisement prepared by Mr. Mitchell and which certificate read as follows:

"I hereby certify that Ned Mitchell was appointed by me to appraise the land above described; that he is well acquainted with the value of lands in the vicinity of the [38] tract above described, and fully competent to make such appraisement, and that I verily believe the above appraisement is the true value of the land and the improvements thereon.

Dated 3rd day of September, 1954.

"/s/ LEONARD M. HILL,
"Area Director
Superintendent."

19. That on September 3, 1954 Mr. Hill, as such Area Director, signed the letter addressed to Mr. Edward Woozley, Administrator for Land Management, Department of the Interior, Washington 25,

D. C., a photocopy of a carbon copy of which is identified as Exhibit 3 and annexed to the affidavit of Jerry Nathanson dated June 10, 1957. That a few days after September 3, 1954 plaintiff received a carbon copy of said letter through the United States mail.

20. On March 14, 1955, plaintiff filed a suit against defendant, Jerry Nathanson, as number Indio 367 in the Superior Court of the State of California in and for the County of Riverside, entitled "Andreas v. Nathanson et al.," to collect damages alleged to have been suffered by plaintiff through the sale of subject property defendants, Henderson and Upchurch. Thereafter, on April 15, 1955, and for a valuable consideration, plaintiff dismissed said suit with prejudice. That a true copy of said dismissal is identified as Exhibit "C" is annexed to defendants' proposed second amended and supplemental answer and counter claim which was heretofore lodged with the clerk in this case.

21. On April 20, 1955, plaintiff, his wife, Margaret Andreas, and defendant, Jerry Nathanson, executed, for a valuable consideration a mutual general release from all actions, claims and demands up to April 20, 1955. That a true copy of said mutual general release was annexed and marked as Exhibit "D" to defendants' proposed second amended [39] and supplemental answer and counter claim which was heretofore lodged with the clerk in this case.

Dated: November 13, 1957.

WARREN E. SLAUGHTER,
VAUGHAN, BRANDLIN &
BAGGOT,

By /s/ THOMAS G. BAGGOT,
Attorneys for Plaintiff.

IRL DAVIS BRETT,
JEROME L. RICHARDSON,

By /s/ IRL D. BRETT,
Attorneys for Defendants.

/s/ ALBERT G. BERGMAN.

[Endorsed]: Filed November 19, 1957. [40]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Andreas is an Indian and a member of the Agua Caliente band of Mission Indians commonly called the Palm Springs band. As plaintiff, he seeks to have declared void a deed by which he conveyed certain real property located in Palm Springs to the defendants Henderson and Upchurch.

Federal jurisdiction is invoked under 28 U. S. C. 1331, upon the ground that the controversy arises under the General Allotment Act, 24 Stat. 388, 25 U. S. C. 331, et seq., and the Mission Indian Act of

January 12, 1891, 26 Stat. 712, amended by the Act of August 24, 1954, 68 Stat. 791.

The Mission Indian Act provides that certain reservation lands should be allotted to members of the tribe to be held in trust for a period, and on application of the Indian, to be conveyed to him in fee. Until a patent in fee is issued to the Indian, the land is held in trust by the Government and "* * * if any conveyance shall be made of the lands set apart and allotted * * * or any contract made touching the same" (before the patent in fee is issued), "such conveyance or contract shall be absolutely null and void * * *" It is this quoted clause with which we are concerned. [43]

On July 7, 1954, the United States of America executed and issued to Andreas a trust patent to the real property which is the subject of this litigation. On July 29, 1954, Andreas and defendants Henderson and Upchurch entered into a written escrow agreement at a Palm Springs bank, whereby plaintiff agreed to sell and the defendants agreed to buy the subject property for $20,000 payable $5,000 through escrow and the balance of $15,000 by promissory note secured by a first deed of trust on the property. Andreas executed a grant deed on August 2, 1954, and on August 5, 1954, deposited it in escrow. The trust deed by Henderson and Upchurch was signed and delivered to the escrow holder on September 17, 1954.

On December 14, 1954, the trust period expired and the United States of America executed and

issued a fee simple patent. On December 15, 1954, Andreas, Henderson and Upchurch signed amended escrow instructions as follows:

> "You are hereby authorized and instructed to record the grant deed in your escrow No. 3360 upon execution of these amended escrow instructions. You are instructed to continue to hold this escrow open until the fee patent is placed in escrow.
>
> "You are further authorized and instructed to pay the sum of $500.00 from funds you hold in above escrow, to John Andreas, upon execution of these amended escrow instructions."

Thereafter the fee simple patent was deposited in escrow, the documents recorded, and the funds paid to Andreas.

The controlling questions in this case are: Was the conveyance made during the trust period; and if not, is a conveyance which is made after the trust period void because made in accordance with a contract entered into during the trust period?

While title to property placed in escrow does not, as a general rule, pass, at least until the conditions of the [44] escrow have been filled, Holman v. Toten, 54 Cal. App. 2d 309, 128 P. 2d 808 (1942); Blumenthal v. Liebman, 109 Cal. App. 2d 374, 240 P. 2d 699 (1952); Todd v. Vestermark, 145 Cal. App. 2d 374, 302 P. 2d 347 (1956); 18 Cal. Jur. 2d, S. 24, p. 340, the plaintiff contends that under the doctrine of "relation back" title should be deemed

to have passed at the time of the deposit of the deed in escrow and thus title would have passed during the period when the restrictions on alienation still existed.

The doctrine of "relation back" has been used to avoid injustices involved in a strict application of the rule which provides that title to property placed in escrow does not pass until the conditions of the escrow are completed. Thus, under the "relation back" doctrine, the title is treated as relating back to and taking effect at the time of the deposit of the deed in escrow. 117 A. L. R. 69; 18 Cal. Jur. 2d S. 27, p. 347. This fiction of "relation back" has been employed in many California escrow situations. See McDonald v. Huff, 77 Cal. 279, 19 P. 499 (1888); Marr v. Rhodes, 131 Cal. 267, 63 P. 364 (1900); Hawi Mill & Plantation Co. v. Finn, 82 Cal. App. 255, 255 P. 543 (1927); Deming v. Smith, 19 Cal. App. 2d 683, 66 P. 2d 454 (1937). The use of the doctrine in these cases was for the purpose of giving effect to the intention of the parties and to avoid hardship. In the absence of such circumstances, the doctrine should not be applied. Vierneisal v. Rhode Island Ins. Co., 77 Cal. App. 2d 229, 175 P. 2d 63 (1946).

If the doctrine of "relation back" were applied here, we would have the anomalous situation of the court making a fictional finding that title passed at an earlier date for the purpose of holding that in fact no title passed at all because of the violation of the restrictions on alienation imposed by [45]

the Mission Indian Act. Nor is there any basis for invoking the doctrine on the theory of avoiding hardship. If the plaintiff prevails in this case he will retain both the land and the consideration he received for the sale of the land. See Heckman v. United States, 224 U. S. 413 (1911); Oates v. Freeman, 57 Okla. 449, 157 P. 74 (1915). To employ the fictional doctrine in order to grant the plaintiff a windfall at the expense of the defendants would be to use it for a purpose contrary to that for which it is intended.

Andreas contends that a contract void because made during the trust period so taints a conveyance made in pursuance of such a contract that such conveyance is void, even though the conveyance itself was made after the fee patent was obtained by the grantor. Plaintiff relies on a line of Oklahoma decisions which hold that a conveyance made after the expiration of the trust period, pursuant to an agreement to convey made during the trust period, is void. Carter v. Prairie Oil & Gas Co., 58 Okla. 365, 160 P. 319 (1915), Appeal Dismissed in 244 U. S. 646 (1916); Williams v. Diesel, 65 Okla. 163, 165 P. 187 (1917); Nixon v. Woodcock, 64 Okla. 86, 166 P. 183 (1917); Folsom v. Jones, 68 Okla. 233, 173 P. 649 (1918); Adams v. Hoskins, 96 Okla. 239, 221 P. 728 (1923); Kelley v. New State Land Co., 115 Okla. 170, 245 P. 988 (1925), cert. den. in 273 U. S. 720. These decisions do not involve a construction of the General Allotment Act or the Mission Indian Act. They are based upon the wording of Section 19 of the Act of April 26, 1906,

34 Stat. 144, which was a special statute applicable only to certain named of the Five Civilized Tribes. Heckman v. United States, supra. That Act provided: [46]

> "Every deed executed before or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void."

Thus, it can be seen that the cases on which plaintiff relies were compelled to the conclusions reached by the express wording of the statute involved. The Act of May 27, 1908, 35 Stat. 312 repealed the Act of April 26, 1906, and the Oklahoma decisions take cognizance of the elimination of the compelling language. See McKeever v. Carter, 53 Okla. 360. 157 P. 56 (1916).

Unlike the Act of April 26, 1906, 34 Stat. 144, the Mission Indian Act, which is the controlling statute in the instant case, does not provide that a conveyance made after the removal of restrictions, if made in pursuance of an agreement entered into before the removal of such restrictions, is void. Section 5 of the Mission Indian Act provides that "if conveyance * * * or any contract" is made during the trust period, "such conveyance or contract shall be absolutely null and void." In both clauses the words "contract" and "conveyance" are expressed in the disjunctive. If Congress had intended to void a conveyance made after the removal of restrictions, if made in pursuance of a contract entered into before the removal of restrictions, it

would have done so by the use of clear language as it did in the Act of April 26, 1906, 34 Stat. 144. Congress chose not to do so.

While it is true that the purpose of the restrictions on alienation imposed by the Indian acts is to protect the Indian from the greed of the white man and from his own improvidence, Starr v. Long Jim, 227 U. S. 613 (1913); Mullen v. Simmons, 234 U. S. 192 (1914); Flournoy Live-Stock & Real-Estate Co., 65 F. 30 (C. C. A. 8th 1894), Appeal Dismissed in 163 U. S. 686; Choctaw Lumber Co. v. Coleman, 56 Okla. 377, 156 P. 222 (1916), it is, of course, necessary that the statute in fact have [47] been violated before the conveyance should be held void. In the instant case the contract to sell was void under the statute because made during the period of restrictions. Being void, the contract was incapable of being ratified and specific performance could not have been compelled by the defendants. Spector v. Pete, 157 A. C. A. 461 (1958); McKeever v. Carter, supra. But this does not mean that after he received the fee patent and the trust period ended, the Indian could not then make a valid conveyance of the allotted lands. Nor would it make any difference if the land were conveyed on the identical terms contained in the void contract. To hold otherwise would be to penalize the Indian, which was not the intention of Congress.

This case does not involve the enforcement or ratification of a contract void or otherwise. On December 15, 1954, after the expiration of the trust period, Andreas signed amended escrow instructions

authorizing the delivery and recordation of the grant deed he had previously signed. He was free to convey the property at this time, and though he was not required to, he chose to deposit the fee patent, to order the delivery and recordation of the deed, and to accept the consideration. The conveyance, made after the removal of restrictions, was valid.

Counsel for defendant is directed to prepare, serve and lodge findings and judgment in accordance with local Rule 7.

Dated: March 21, 1958.

/s/ WM. M. BYRNE,

United States District Judge.

[Endorsed]: Filed March 21, 1958. [48]

In the United States District Court, Southern District of California, Central Division

No. 20798—WB

JOHN ANDREAS,

Plaintiff,

vs.

JANE DOE HENDERSON, et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause came on regularly to be heard in courtroom No. 3 of the above-entitled Court, second floor

of the United States Courthouse and Post Office Building, 312 North Spring Street, Los Angeles 12, California, on the 19th and 20th days of November, 1957, the Honorable William M. Byrne, United States District Judge, presiding, and was tried without a jury, a jury trial having been expressly waived by all parties in open court; Warren E. Slaughter, Robert A. Schlesinger and Vaughan, Brandlin & Baggot (Thomas G. Baggot, Esq., appearing at and conducting the trial) appeared as counsel for plaintiff, and Irl Davis Brett, Jerome L. Richardson and Albert G. Bergman (Messrs. Brett and Bergman appearing at and conducting the trial) appeared as counsel for defendants Lillian R. Henderson (sued herein as Jane Doe Henderson), Frances Upchurch (sued herein as Mary Doe Upchurch), Jerry Nathanson, Samuel Sontag [49] (whose appearance was pleaded as Santog but whose true name is Sontag), and George Goldberg;

Whereupon, evidence, oral and documentary, was offered and received in evidence, and the case being closed, the cause was submitted to the Court for consideration and decision;

Now, therefore, the Court finds the facts to be as follows:

Findings of Fact

I.

Between July 7, 1954, and the date of trial, plaintiff, John Andreas, was and still is an Indian and a member of the Agua Caliente Band of Mission

Indians which then was and still is commonly called the Palm Springs Band of Mission Indians.

II.

On July 7, 1954, the United States of America executed and issued to plaintiff a trust patent being No. 1145356, to the following-described real property situated in the County of Riverside, State of California:

> The South one-half of the Northwest quarter of the Northwest quarter of Section 2, Township 4 South, Range 4 East, S.B.B. & M.

This property is hereinafter called "subject property." That a true copy thereof was received in evidence as Exhibit 1.

III.

On July 29, 1954, plaintiff, John Andreas, and defendants, Lillian R. Henderson and Frances Upchurch, entered into a written escrow agreement, a true copy of which was received in evidence as Exhibit 2, and a true copy of which is annexed hereto marked as Exhibit A and by such reference incorporated herein as if herein set out in full. [50]

IV.

Plaintiff signed a grant deed of subject property to said Henderson and Upchurch on August 2, 1954, acknowledged the same before a Riverside County (California) notary public on August 5, 1954, and deposited said deed in such escrow on

August 5, 1954. A true copy of said grant deed was received in evidence as Exhibit 3.

V.

On August 2, 1954, defendants, Henderson and Upchurch, executed a promissory note for $15,000.00 in favor of plaintiff which was payable in installments as provided for in said escrow instructions, and on the same date they signed a first trust deed upon subject property to secure payment of said note. On September 17, 1954, said defendants acknowledged said trust deed before a Riverside County (California) notary public and deposited said note and trust deed in such escrow. A true copy of said first trust deed was received in evidence as Exhibit 4.

VI.

Said escrow instructions included express provisions for the deposit by plaintiff therein and for the recording by and out of such escrow of a fee simple patent from the United States of America to plaintiff of subject property when such fee patent was issued to and received by plaintiff and said escrow instructions further expressly provided that "close of escrow will be when the fee simple patent to the seller (who was the plaintiff) and the grant deed from seller to the above vestees (who were Henderson and Upchurch) are recorded."

VII.

The escrow holder retained in its possession in such escrow until December 15, 1954 (or a later

date), all moneys and [51] writings deposited with it.

VIII.

On December 14, 1954, the United States of America executed and issued to plaintiff a fee simple patent to subject property, a true copy of which was received in evidence as Exhibit 5.

IX.

On December 15, 1954, plaintiff and defendants, Henderson and Upchurch, signed and delivered to the escrow holder amended escrow instructions reading:

> "You are hereby authorized and instructed to record the grant deed in your escrow No. 3360 upon execution of these amended escrow instructions. You are instructed to continue to hold this escrow open until the fee patent is placed in escrow.
>
> "You are further authorized and instructed to pay the sum of $500.00 from funds you hold in above escrow, to John Andreas, upon execution of these amended escrow instructions."

X.

After such amended escrow instructions were signed and delivered and before this suit was filed, the fee simple patent to plaintiff was deposited in the escrow, the patent, deed and trust deed were recorded in the office of the County Recorder of

Riverside County, California, as follows: The patent on December 29, 1954, in Book 1671 at page 543 of Official Records, the deed on December 21, 1954, in Book 1669 at page 69 of Official Records and the trust deed on December 21, 1954, in Book 1669 at page 27 of Official Records; the note was delivered to plaintiff and the funds constituting the purchase price were paid, or tendered in full payment, to plaintiff.

XI.

After the escrow was closed and before this suit was filed, the title to subject property was conveyed by mesne conveyances of record so that at the date when this suit was filed such title was vested in undivided one-third interests in [52] defendants, Jerry Nathanson, Samuel Sontag and George E. Goldberg, subject to an unaccepted but tendered balance of $12,961.18, secured by said first trust deed which is still held and owned by plaintiff, and defendants, Lillian R. Henderson and Frances Upchurch, had no right, title or interest in subject property and have each expressly disclaimed any interest therein.

XII.

Prior to the filing of this suit and at all times thereafter, defendants have tendered the full unpaid balance of said note secured by said trust deed to plaintiff conditioned only that he cause said note to be satisfied and discharged and said trust deed to be extinguished through a reconveyance by the trustee named therein and have continued such tender in effect by depositing it as such tender to

plaintiff with such escrow bank but plaintiff has continuously refused such tender and has refused to surrender up such note and to direct the trustee named in such trust deed to reconvey subject property.

XIII.

Federal jurisdiction is invoked under 28 U.S.C. 1331, upon the ground that the controversy arises under the General Allotment Act, 24 Stat. 388, 25 U.S.C. 331, et seq., and the Mission Indian Act of January 12, 1891, 26 Stat. 712, amended by the Act of August 24, 1954, 68 Stat. 791.

The Mission Indian Act provides that certain reservation lands (which includes subject property) should be allotted to members of the tribe to be held in trust for a period, and on application of the Indian, to be conveyed to him in fee. Until a patent in fee is issued to the Indian, the land is held in trust by the Government and "* * * if any conveyance shall be made of the lands set apart and allotted * * * or any contract made touching [53] the same" (before the patent in fee is issued), "such conveyance or contract shall be absolutely null and void * * *" It is this quoted clause with which we are concerned.

XIV.

Other issues are raised by the pleadings but such issues have become irrelevant and immaterial in view of the conclusions which the Court is making based upon the foregoing findings and, for such reason, it is unnecessary for the Court to make find-

ings thereon or to determine the legal issues thereby raised and the Court makes no findings thereon and draws no conclusions with respect thereto.

And from the foregoing findings of fact, the Court draws and makes the following conclusions of law and order for judgment:

Conclusions of Law

I.

This Court has jurisdiction of the parties and of this cause pursuant to Title 28, U.S.C., Section 1331.

II.

The issuance of the fee simple patent by the United States of America to John Andreas of subject property on December 14, 1954, terminated the trust restrictions thereon and invested said patentee with unrestricted fee simple title to such property as of said date.

III.

Neither Section 5 of the General Allotment Act (Title 25, U.S.C., Section 348) nor Section 5 of the Mission Indian Act (26 Stat. 712 as amended by the Act of August 24, 1954; 68 Stat. 791) prohibited or made void plaintiff's conveyance to Henderson and Upchurch. [54]

IV.

The doctrine of "relation back" is inapplicable to the facts of this case.

V.

There was no conveyance of subject property by plaintiff until after the fee patent had been issued to him.

VI.

The voluntary delivery of the grant deed of subject property from John Andreas to Lillian R. Henderson and Frances Upchurch pursuant to the express written consent and direction of John Andreas, made after the trust restrictions were removed, was valid and binding upon all parties hereto.

VII.

Defendants, Jerry Nathanson, Samuel Sontag and George E. Goldberg, are entitled to judgment:

(1) That plaintiff take nothing by his complaint, as amended, except (as has at all times been conceded by them and has been and is now tendered by them to plaintiff) the right to collect and receive the balance of the purchase price in the sum of $12,961.18, without interest, conditioned upon and coincident with the delivery to said defendants of the promissory note secured by the first trust deed and his executed request to the trustee named in such trust deed for a full reconveyance thereof.

(2) That the full fee simple title to subject property is invested and quieted in undivided one-third interests, each, in Jerry Nathanson, Samuel Sontag and George E. Goldberg and plaintiff, his attorneys, agents, heirs, administrators, executors, successors and assigns (other than Lillian R. Henderson and

Frances Upchurch and all who deraign title through and under them) be enjoined and [55] debarred forever from asserting any right, title or interest therein.

(3) That defendants have and recover their costs and disbursements as provided by law.

Dated: May 15, 1958.

/s/ WM. M. BYRNE,
United States District Judge.

JUDGMENT

In accordance with the foregoing findings of fact and conclusions of law, it is Ordered, Adjudged and Decreed:

I.

This Court has jurisdiction of the parties and of this cause pursuant to Title 28 U.S.C., Section 1331.

II.

That the subject matter of this action, which is hereinafter referred to as "subject property," is that certain real property situated in the County of Riverside, State of California, described as:

> The South one-half of the Northwest quarter of the Northwest quarter of Section 2, Township 4 South, Range 4 East, S.B.B. & M. [56]

III.

The issuance of the fee simple patent by the United States of America to John Andreas of sub-

ject property on December 14, 1954, terminated the trust restrictions thereon and invested said patentee with unrestricted fee simple title to such property as of said date.

IV.

Neither Section 5 of the General Allotment Act (Title 25 U.S.C., Section 348) nor Section 5 of the Mission Indian Act (26 Stat. 712 as amended by the Act of August 24, 1954; 68 Stat. 791) prohibited or made void plaintiff's conveyance to Lillian R. Henderson and Frances Upchurch.

V.

The doctrine of "relation back" is inapplicable to the facts of this case.

VI.

There was no conveyance of subject property by plaintiff until after the fee patent had been issued to him.

VII.

The voluntary delivery of the grant deed of subject property from John Andreas to Lillian R. Henderson and Frances Upchurch pursuant to the express written consent and direction of John Andreas, made after the trust restrictions were removed, was valid and binding upon all parties to this action.

VIII.

That plaintiff take nothing by his complaint, as amended, except (as has at all times been conceded

by them and has been and [57] is now tendered by them to plaintiff) the right to collect and receive the balance of the purchase price in the sum of $12,961.18, without interest, conditioned upon and coincident with the delivery to said defendants, Nathanson, Sontag and Goldberg, of the promissory note secured by the first trust deed and his executed request to the trustee named in such trust deed for a full reconveyance thereof.

IX.

That the full fee simple title to subject property is invested and quieted in undivided one-third interests, each, in Jerry Nathanson, Samuel Sontag and George E. Goldberg, and plaintiff, his attorneys, agents, heirs, administrators, executors, successors and assigns (other than Lillian R. Henderson and Frances Upchurch and all who deraign title through and under them) be, and they are hereby, enjoined and debarred forever from asserting any right, title or interest therein.

X.

That defendants, Lillian R. Henderson and Frances Upchurch, had no right, title or interest in or to the property described in paragraph II hereof.

XI.

That defendants, Jerry Nathanson, Samuel Sontag and [58] George E. Goldberg, have and recover their costs and disbursements as provided by law as against plaintiff, John Andreas, taxed at $106.72.

Dated: May 15, 1958.

/s/ WM. M. BYRNE,
United States District Judge.

Approved as to form under Rule 7.

WARREN E. SLAUGHTER, and
ROBERT A. SCHLESINGER,
VAUGHAN, BRANDLIN &
BAGGOT,

By /s/ THOMAS G. BAGGOT,
Attorneys for Plaintiff.

Presented by:

/s/ IRL D. BRETT,
Attorney for Defendants.

[Endorsed]: Filed May 15, 1958.

Entered May 16, 1958. [59]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To Defendants Lillian R. Henderson (sued herein as Jane Doe Henderson), Frances Upchurch (sued herein as Mary Doe Upchurch), Jerry Nathanson, Samuel Sontag and George Goldberg, and Their Attorneys, Irl Davis Brett and Jerome L. Richardson:

Please Take Notice that plaintiff will, in the courtroom of the Honorable William M. Byrne,

United States District Judge for the Southern District of California, at the United States Courthouse, Los Angeles, California, move the court for its order vacating and setting aside the decision and judgment entered herein on May 16, 1958, and granting to plaintiff a new trial, and for such other orders as may be meet and just on the following grounds:

1. Insufficiency of the evidence to justify the decision.

2. Errors of law occurring at the trial. [67]

3. The decision and judgment are against law.

The errors in law relied upon are the following:

1. The court erred in deciding that the conveyance was not made during the trust period.

2. The court erred in deciding that the conveyance was valid even though made pursuant to a void contract entered into during the trust period.

3. The court erred in deciding that the title did not pass as of the date of the contract, i.e., the escrow instructions.

4. The court erred in deciding, in effect, that the amendment to the escrow instructions dated December 15, 1954, did not relate to the original contract, i.e., the escrow instructions.

The evidence is insufficient to justify the decision in the following particulars:

1. Insufficiency of the evidence to justify the

findings and decision that the conveyance was not made during the trust period.

2. Insufficiency of the evidence to justify the findings and decision that conveyance was valid even though made pursuant to a void contract entered into during the trust period.

3. Insufficiency of the evidence to justify the findings and decision that title would not pass as of the date of the contract, i.e., the escrow instructions.

4. Insufficiency of the evidence to justify the findings and decision, in effect, that the amendment to the escrow instructions dated December 15, 1954 did not relate to the original contract, i.e., the escrow instructions.

Said motion will be made and based on the pleadings and papers on file herein, and upon the minutes of the court.

Dated: May 21, 1958.

WARREN E. SLAUGHTER,
VAUGHAN, BRANDLIN &
BAGGOT,

By /s/ THOMAS G. BAGGOT,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 22, 1958. [68]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

Plaintiff John Andreas having timely filed a Notice of Motion for New Trial and said cause and motion having been set to be heard and having come on for hearing in the courtroom of and before the Honorable William M. Byrne, United States District Judge for the Southern District of California, at the United States Courthouse, Los Angeles, California, on Thursday, June 26, 1958, at the hour of 9:45 a.m., Thomas G. Baggot, Esq., appearing and submitting oral argument in behalf of said moving plaintiff, and Irl Davis Brett, Esq., having appeared for defendants in response to and in opposition to such motion and the cause having been argued and submitted to the Court for consideration and decision

It Is Ordered that plaintiff's Motion for New Trial be, and it is hereby denied. [71]

Dated: June 21, 1958.

/s/ WM. M. BYRNE,
United States District Judge.

Approved as to form under Rule 7.

WARREN E. SLAUGHTER, and
ROBERT A. SCHLESINGER,
VAUGHAN, BRANDLIN &
BAGGOT,

By /s/ THOMAS G. BAGGOT,
Attorneys for Plaintiff.

Presented by:

/s/ IRL D. BRETT,
Attorney for Defendants.

[Endorsed]: Filed June 26, 1958. [72]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendants Lillian R. Henderson (sued herein as Jane Doe Henderson), Frances Upchurch (sued herein as Mary Doe Upchurch), Jerry Nathanson, Samuel Sontag and George Goldberg, and Their Attorneys, Irl Davis Brett and Jerome L. Richardson:

Notice Is Hereby Given that plaintiff John Andreas hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on May 16, 1958.

Dated: July 22, 1958.

WARREN E. SLAUGHTER,
VAUGHAN, BRANDLIN &
BAGGOT,
By /s/ THOMAS G. BAGGOT,
Attorneys for Plaintiff and
Appellant John Andreas.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 24, 1958. [73]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL

On the ex parte motion of plaintiff and upon the Affidavit of Thomas G. Baggot, one of counsel for plaintiff, and the court being fully advised,

It Is Hereby Ordered that the time for filing record on appeal herein with the United States Court of Appeals for the Ninth Circuit and for docketing therein the appeal taken by plaintiff by Notice of Appeal filed July 24, 1958, is extended to October 1, 1958, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: Aug. 25, 1958.

/s/ BEN HARRISON,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 25, 1958. [87]

In the United States District Court, Southern District of California, Central Division

No. 20,798—WB—Civil

JOHN ANDREAS,

Plaintiff,

vs.

JANE DOE HENDERSON, et al.,

Defendants.

Honorable Wm. M. Byrne, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Wednesday, November 20, 1957

Appearances:

For the Plaintiff:
MESSRS. VAUGHAN, BRANDLIN & BAGGOT, by
THOMAS BAGGOT, ESQ.

For the Defendants:
IRL D. BRETT, ESQ.,
ALBERT G. BERGMAN, ESQ.

HENRY HARRIS, JR.

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: Give us your full name, sir.
The Witness: Henry Harris, Jr.

(Testimony of Henry Harris, Jr.)

Direct Examination

By Mr. Brett:

Q. Mr. Harris, where do you reside at this time?

A. Berkeley, California.

Q. Were you employed by the Bureau of Indian Affairs during the year 1954?

A. During part of the year, yes, sir.

Q. And during what part of the year?

A. I terminated my services with them in November of 1954.

Q. Prior to that termination what was your position with the Department?

A. I was the assistant area director for the State of California.

Q. And was that true during the entire portion of the year 1954 up to the date of the termination of your connection with it? [1*] A. Yes, sir.

Q. Now, was the Palm Springs Indian Reservation within the jurisdiction of that area?

A. It was.

Q. Who at that time was the area director?

A. Mr. Leonard M. Hill.

Q. Do you know whether he still is area director?

A. He is.

Q. Who at that time was the local or district agent in charge of the Palm Springs Indian Reservation? A. Mr. Ned Mitchell.

Q. Where were your headquarters?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Henry Harris, Jr.)

A. Sacramento, California.

Q. In the course of your official duties were you called upon and did you go to the Palm Springs reservation upon occasion? A. Very often.

Q. Now, did you become acquainted with the plaintiff John Joseph Andreas in the course of your duties? A. Yes.

Q. Would you state about when?

A. I came with the Bureau of Indian Service in February of 1951 and knew him from then on.

Q. At that time was he employed in any capacity?

A. He worked as a toll gate man in the [2] canyon.

* * *

Q. Now, do you know Mr. Jerry Nathanson?

A. I do.

* * *

Q. Did you also become acquainted with the wife of John Joseph Andreas, Margaret [3] Andreas? A. I did.

* * *

Q. Now, Mr. Harris, during the year 1954 and up until November of that year when you terminated your Government service were there any printed official regulations by the Secretary of the Interior with respect to the manner of handling the request of an Indian allottee who owned trust patented lands to become able to sell those lands to a non-Indian?

(Testimony of Henry Harris, Jr.)

A. None of which I had knowledge, no, sir.

Q. Was it a part of your official duties to attend to and make recommendations on such matters?

A. It was.

Q. Before July of 1954 had you done so in a number of occasions? A. Yes, sir. [4]

* * *

Q. (By Mr. Brett): Were there regulations that were oral that you were to follow in such [5] instances?

A. We had very definite methods which we did follow in order to do that.

Q. And they were methods that were approved and required by the Area Director?

A. That's right. [6]

* * *

Q. (By Mr. Brett): Did you have any directions from Area Director Hill as to what you were to do if an Indian member of the Palm Springs Band, having restricted allotted lands, expressed the desire to sell those lands? [8]

* * *

The Witness: Yes.

Q. (By Mr. Brett): Would you state what those directions were?

* * *

The Witness: My directions in those instances where I had any part were substantially these: We were to ascertain whether the Indian desired to sell; in other words, that this was something he

(Testimony of Henry Harris, Jr.)

wished and that he was not being pressured, that it was his own personal desire.

We were to review the advantageousness of the sale. We were to go over the plans of the Indian to see how he wished to use the funds and what his future plans would be. And any other pertinent factors which might apply in the individual case, each case being different; then I would give to Mr. Hill my recommendation. We would go over the matter.

May I add something to that? I did not at any time take the applications. That was not my function. That was the District Agent's function. Nor did I make a written report, as such.

I acted purely in the capacity of adviser and recommender as an intermediary position between the Agent and the Director.

Q. In other words, you were in between the District Agent and the Area Director?

A. That's right. [9]

Q. You were the man who ultimately presented it to Mr. Hill for approval or disapproval?

A. Yes, in those instances where I was concerned. There were instances where I was not involved.

* * *

Q. (By Mr. Brett): I direct your attention, Mr. Harris, to a photocopy of an application for patent in fee which is dated July 19, 1954, and signed by John J. Andreas, and is witnessed by Mary B. Whittman and Ned Mitchell.

(Testimony of Henry Harris, Jr.)

Have you seen the original of that document?

A. Yes, I have.

Q. And did you see it before it was ultimately presented to Mr. Hill? A. Oh, yes.

Q. Now, having in mind the date of that document, which is July 19, 1954, did you receive any information with respect to the desire of John Andreas to sell any of his trust patented lands?

A. Yes.

Q. And from whom did you receive that information?

* * *

The Witness: For some time preceding this Mrs. Andreas [10] conversations with me regarding their financial problems. There were four minor children in the home and they had very little income.

* * *

The Court: He said Mrs. Andreas.

* * *

Q. (By Mr. Brett): Did you receive that information from any other person?

A. Mr. Andreas.

Q. What did you do after you received that information? Tell us who you saw. [11]

* * *

The Witness: As I understood the question, your Honor, I believe Mr. Brett asked me whether I had conversations with them indicating their desire in this matter. Isn't that correct? Wasn't that the substance of your question?

(Testimony of Henry Harris, Jr.)

Mr. Brett: That's right, in selling their trust patented land.

The Witness: And my answer was that I had talked to Mr. Andreas on that and Mrs. Andreas.

The Court: All right.

Q. (By Mr. Brett): Where did you talk to Mr. John J. Andreas?

* * *

A. Palm Springs.

Q. And was that before July 19, 1954?

A. Yes.

Q. Will you state to the court briefly what the conversation was that you had at that time? [12]

* * *

The Witness: The substance of the conversation was that he wished to sell his lands. I wanted him to understand that they would have to take a fee patent to all the land. They couldn't sell only one parcel. I wanted to be sure he understood that. And that was discussed.

Q. (By Mr. Brett): Now, did you have any conversation with Mr. Jerry Nathanson prior to July 19, 1954, with respect to this land? [13]

* * *

The Witness: Yes.

Q. (By Mr. Brett): Where did you have that conversation?

A. In Palm Springs. I wouldn't know exactly, but in Palm Springs.

(Testimony of Henry Harris, Jr.)

Q. Will you give us the substance of that conversation?

* * *

The Witness: That conversation had to do with the following things: Firstly, that it would be necessary that there be buyers for all the parcels of lands belonging to Mr. Andreas, otherwise I would not care to recommend because the lands would become subject to taxation. I explained that to him. Also, that I wished to have some money, some [14] type of protection for the Indian because of the difficulties existing at the time in litigation, so that if the Indian wished to go through with the sale and if the buyers then wanted to back out there would be money up that the Indian would be rightfully able to claim and own.

And, thirdly, that I wanted it to be clearly expressed and stated in writing that there would be no guarantee of title as to these lands or representation of any kind on the part of the Indians.

Q. (By Mr. Brett): Now, what, if anything, did you tell Mr. Nathanson with respect to protecting the Indian by having some form of deposit made? What did you tell him you would require?

* * *

The Witness: I insisted on his opening an escrow, and I wanted to see it and know what was in it before I would recommend in order to cover the points that I mentioned, that there would be money which the Indian would receive if the buyers

(Testimony of Henry Harris, Jr.)
defaulted, and that there was no representation on title. [15]

* * *

Q. (By Mr. Brett): May I ask, Mr. Harris, were you referring in any respect to any defect of title arising out of this transaction? Or were you referring to some suit that was pending against the land?

* * *

The Witness: I have reference to pending litigation; and the fact that the title companies, although I had personally tried to get them to do so would not write title insurance on these lands.

Q. (By Mr. Brett): And was that pending litigation in this very court? I don't mean before his Honor, but the District Court of the United States in this District?

* * *

The Witness: It was.

Q. (By Mr. Brett): What was the name of the case?

A. Segundo—I can't give you the full name. It was an action—Segundo vs. the United States, I believe.

Q. Now, Mr. Harris, after that conversation that you [16] had with John Andreas that you have referred to and the conversation you had with Mr. Jerry Nathanson, did you in addition to seeing the original of the application—that is, Defendants' Exhibit C—see the original of a superintendent's report on that application made by Mr. Ned

(Testimony of Henry Harris, Jr.)

Mitchell? A. Yes, sir.

Q. And did you discuss the details that are set forth therein with Mr. Mitchell?

A. I believe that we talked prior to the time that he wrote it. I can't definitely state whether we had conversations after. I do know this, that we did consult on the matter and I did have this instrument before me at the time I talked to Mr. Hill.

Q. Now, prior to the time that you talked with Mr. Hill did you have before you and have knowledge of the original of the certificate of appraisement by Mr. Ned Mitchell, which is Defendants' Exhibit E? A. Yes.

Q. Now, in that month of July, 1954, were you familiar with the 20-acre parcel which is the subject matter of this action? A. I was.

* * *

Mr. Baggot: There is no question of this man's good faith, Mr. Brett.

* * *

Q. (By Mr. Brett): Mr. Harris, after having examined the exhibits, and before you talked to Mr. Hill, did you also have a copy of the escrow instructions that had been [18] initiated July 29th by the Citizens Bank?

A. I can only answer that by saying I believe so. I can't give you a positive answer. I knew of what was in them. I know that they were a part of the record when it went in; in other words, a part of our record in the Sacramento office. And I know

(Testimony of Henry Harris, Jr.)

that I would not have made the recommendation if they had not contained the things I insisted on. But I cannot pin it as to date, Mr. Brett. I am not able to do that.

Q. Now, after you had the original documents before you and knowledge of their contents and had information as to what was in the escrow, which is No. 3360, did you recommend approval to Mr. Hill? A. I did.

Q. Will you state to the court what the purpose of that recommendation was?

A. In order to effectuate what the Andreases desired in order to enable them to sell their lands and get some income and some cash. And the other points I have already discussed, to protect them.

* * *

Cross-Examination

By Mr. Baggot:

Q. Mr. Harris, at the time of this transaction between plaintiff Andreas and the defendants Upchurch and Henderson you were in the position of assistant area director? A. That's correct.

Q. And in that position you were an intermediary between Mr. Ned Mitchell, the District Agent, and Mr. Leonard Hill, the Area Director?

A. I would say that is correct.

Q. And whatever information you obtained concerning this transaction, I take it, you obtained primarily and first from Mr. Mitchell. Is that true?

A. Well, no, I wouldn't say that is true because

(Testimony of Henry Harris, Jr.)

I—I did talk with Mr. Mitchell, but I talked with the parties, also.

Q. I see. Now, Mr. Harris, the function of the Bureau of Indian Affairs in acting upon an Indian's application for a patent in fee is to determine to the best of the [26] ability of the Bureau whether or not the particular Indian that is applying for a patent in fee is capable of managing his own affairs, isn't that a correct statement?

* * *

The Witness: I would say that is correct as far as it goes. I don't believe that is a full statement of the functions. But as far as it goes, I would agree. [27]

* * *

Q. (By Mr. Baggot): Now, Mr. Harris, you testified on your direct examination that you recommended approval to Mr. Hill? A. Yes, sir.

Q. Now, my question is, what did you recommend approval of?

A. I recommended approval of the application for the granting of the fee patent in view of all the contents of the application, in order to implement the sale which the Indian desired to make.

Q. And the proposal as to this sale was just one of a number of factors that you took into consideration in recommending the approval of an application for a patent in fee, isn't that correct?

A. That is correct.

Q. And you did not, in your official capacity, per se, approve this sale? [29]

(Testimony of Henry Harris, Jr.)

A. I had no authority to approve anything.

* * *

Q. (By Mr. Baggot): You mentioned, Mr. Harris, in your direct examination — and I don't know whether I can quote your exact words or not — it was part of your duty in your official capacity to protect this Indian insofar as possible.

A. That is certainly true.

Q. And one of the ways that you thought he should be protected would be by a binding escrow agreement. Is that right?

A. No, I didn't say anything about a binding escrow agreement. I said that I insisted that these things be contained in an escrow agreement. But I also insisted that there be no binding escrow of any kind, as far as the Indian [30] was concerned, until he put in his fee, which I don't believe is the same thing if I understand your question.

* * *

Q. (By Mr. Baggot): What did you mean by the word "fee"?

A. Well, after the application is approved the fee title to the land is issued to the Indian. In this instance, because of regulations then in effect he would have to take the fee to all his land. That he would receive. Now then, if at that time he elected to come into this escrow and deposit that in order to consummate the deal, that would carry it through. I meant by that he would bring in the [31] instru-

(Testimony of Henry Harris, Jr.)

ment received from the Government, if he so wished.

The Court: Do I understand your statement to be that it was your purpose to see that he was not bound at all until the fee patent was issued to him?

The Witness: Very definitely. And I so explained to him and every other Indian down there to whom I talked to on any deal. They could not do anything until the fee was issued.

Q. (By Mr. Baggot): Now, did you actually see the escrow instructions?

A. Yes, I did. I believe I testified to that on direct this morning.

Q. Yes. I think this morning you weren't sure whether you saw them or not.

A. I said I wasn't sure as to the exact date I saw them. But I definitely saw them because they were reviewed with Mr. Hill before the thing was approved.

Q. I will show you Plaintiff's Exhibit No. 2, a copy of those instructions, and ask you if you recognize those as the instructions that you did see? [32]

* * *

Q. (By Mr. Baggot): After you saw these escrow instructions you were then satisfied as far as the protection to the Indian was concerned, is that right, Mr. Harris?

A. I was satisfied they contained that which I insisted on, yes.

Q. And the purpose of that was to protect the Indian? A. That is correct.

(Testimony of Henry Harris, Jr.)

Q. And you drew the conclusion that this was not binding on the Indian until such time as he deposited his fee patent into the escrow, is that right?

A. It was my intention that it should not be. I am not an attorney. I was of the opinion it served that purpose. [34]

Q. Will you take Plaintiff's Exhibit No. 2 and point out to the court and to me wherein these escrow instructions led you to that conclusion?

A. Would you be good enough to read this last paragraph at the bottom? I think it is down here.

* * *

Here it is. I can read it.

"It is agreed and understood between buyer and seller that there is no title policy involved in this sale of property. And close of escrow will be when fee patent to the seller and the grant deed from the seller to the above vestees are recorded."

Q. That is when close of escrow will be?

A. That is correct. [35]

* * *

Q. (By Mr. Baggot): Mr. Harris, this application for patent in fee, which is Exhibit C for the defendants, appears to be on the printed form of the Department of Interior and appears to be Form 5-105. Is that right? A. Yes.

* * *

Q. (By Mr. Baggot): In this, of course, referring to Exhibit C, that was the standard form of application for patents in fee at the time Mr.

(Testimony of Henry Harris, Jr.)

Andreas made his application, isn't that true?

A. That is correct.

Q. Now, Mr. Harris, in addition to an application for a patent in fee an Indian at the time of this Andreas transaction could, if he so desired, apply to the Department of the Interior to sell his trust allotment by the approval of the Department of the Interior with the Department of the Interior, if it approved, giving a fee patent directly to the purchaser. Isn't that true? [36]

A. Well, that is academically correct. It wasn't the case at Palm Springs at that time. [37]

* * *

JERRY NATHANSON

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: Give us your full name, please.

The Witness: Jerry Nathanson, N-a-t-h-a-n-s-o-n.

Direct Examination

By Mr. Brett:

Q. Mr. Nathanson, you are one of the defendants in this action? A. Yes, I am.

Q. And you are the Jerry Nathanson that has from time to time been referred to in the evidence up to this time? A. That is true. [41]

* * *

Q. (By Mr. Brett): Where do you reside?

A. I reside in Palm Springs.

(Testimony of Jerry Nathanson.)

Q. What is your occupation?

A. I am a real estate broker and member of the Palm Springs City Council.

* * *

Q. (By Mr. Brett): During the entire year of 1954 were you a licensed real estate broker licensed by the State of California? A. Yes, I was.

Q. Do you know the plaintiff John Andreas?

A. I do.

Q. During that entire year and up to the time of escrow No. 3360 were you employed in any capacity by John Andreas? A. Yes, I was.

* * *

Q. (By Mr. Brett): And with reference to the date of application for a fee patent — well, let's put it this way: With reference to July 19, 1954, were you employed [42] before that date?

A. Yes, I was.

Q. What was the employment?

A. That I would try to get customers to sell the parcels of land that they wanted to sell.

Q. As a real estate broker?

A. As a real estate broker.

Q. Did that employment include the 20 acres of land which is the subject matter of this action?

A. That was one of the parcels.

Q. Were you so employed at the time that you had the conversation with Mr. Henry Harris, Jr., which he testified to on the stand?

A. Yes, I was.

Q. Mr. Nathanson, I will show you a photocopy

(Testimony of Jerry Nathanson.)

of the amended escrow instructions which were dated December 15, 1954, and on which there is a notation that it was "Taken out to John by Jerry," and Mrs. Wilson has testified that that was in her handwriting and meant that she had delivered the original to you to take to John.

A. That is true.

Q. Now, you remember that occasion?

A. Now I do.

Q. Did you go out and obtain John Andreas' signature on the document? [43]

A. Yes, I did.

Q. At that time were you employed by him as a broker? A. Yes, I was. [44]

* * *

Cross-Examination

By Mr. Baggot:

Q. Mr. Nathanson, do you have knowledge as to when the fee patent from the United States Government to John Andreas was received by Mr. Andreas?

A. I have knowledge when it was issued and approximately when it was received.

Q. Approximately when was it received?

A. Around the 20th or 21st of the month of December 1954. It was issued on December 14, 1954.

* * *

Q. (By Mr. Baggot): Could it have been received on December 24, 1954?

A. I said "approximately." It could have been. I wasn't concerned with when it was received. I

(Testimony of Jerry Nathanson.)

was concerned when it was issued, because as I understood the Federal law it was effective when it was issued and not when it was received.

Q. As a matter of fact, you were concerned when it was received, weren't you? As soon as it was received you got it and took it into the escrow, didn't you? [47]

A. Part of the escrow, to record it. I was concerned only when it was issued, because on December 1st Mr. Andreas called me and asked for a $500 advance. I approached Mr. Henderson and Mrs. Upchurch on the advance and they said they wouldn't permit any advance until fee title was issued and grant deed recorded. When I found on December 14th that the fee title was issued I called Mrs. Andreas and told her that she could probably get her money because the fee title was issued. That is why on December 15th we went into escrow to amend the instructions, because we knew the fee title was issued and the grant deed could be recorded according to the instructions of the escrow.

* * *

Q. (By Mr. Baggot): You learned about the issuance of [48] this fee patent the very day it was issued in Washington, D. C., didn't you?

A. That's right.

* * *

Q. (By Mr. Baggot): You received a 10 per cent commission in this particular case?

A. Yes, I did.

* * *

[Endorsed]: Filed September 24, 1958. [49]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 88, inclusive, containing the original:

Answer and Counterclaim, Second amended;

Affidavit in support of order extending time on appeal;

Designation of contents of record on appeal;

Designation of additional portions of record on appeal;

Notice of Appeal;

Order extending time to docket appeal;

Statement of points on appeal;

Complaint;

Stipulation and order amending complaint;

Findings of Fact, Conclusions of Law and judgment;

Memorandum of Decision;

Names and Addresses of Attorneys;

Motion for New Trial;

Order Denying Motion for New Trial;

Reply to Amended counterclaim, answer to amended cross claim, demand for jury trial upon factual issues;

Stipulation as to facts;

Stipulation and order re plaintiff's answer to counterclaim; and

Exhibits 1, 2, 3, 4, 5, 6, inclusive; Exhibits 8, 9, 10, 11, 12, 13, 14, inclusive. Exhibits A, B, C, D, E, inclusive; Exhibits G, H, I and J, inclusive. And one volume of reporter's transcript dated November 20, 1957.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated: September 25, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk,

By /s/ EDWARD F. DREW,
Deputy Clerk.

[Endorsed]: No. 16198. United States Court of Appeals for the Ninth Circuit. John Andreas, Appellant, vs. Lillian R. Henderson, Frances Upchurch, Jerry Nathanson, Samuel Sontag and George Goldberg, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: September 27, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16198C

JOHN ANDREAS,

Appellant,

vs.

JANE DOE HENDERSON, et al.,

Appellees.

APPELLANT'S STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 17 (6) of the Rules of the above-entitled Court, the following is a concise statement of the points on which appellant, John Andreas, intends to rely on his appeal herein:

1. Any conveyance of trust land or contract touching the same made during the trust period is absolutely null and void.

2. There was a contract between appellant and appellees Upchurch and Henderson made during the trust period which (but for the General Allotment Act and the Mission Indian Act) was valid and binding.

3. A conveyance was made during the trust period.

4. A conveyance made after the termination of the trust period pursuant to a contract made during the trust period is void.

5. The deposit of the deed in escrow by appellant was irrevocable and title related back to, and passed as of, that time.

6. The contract could not be ratified because it was void.

Dated: October 3, 1958.

WARREN E. SLAUGHTER,
VAUGHAN, BRANDLIN &
BAGGOT,

By /s/ THOMAS G. BAGGOT,
Attorneys for Appellant.

[Endorsed]: Filed October 4, 1958.

[Title of Court of Appeals and Cause.]

STIPULATION THAT EXHIBITS MAY BE CONSIDERED IN THEIR ORIGINAL FORM

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, the undersigned, that none of the exhibits which have been certified as part of the record on appeal need be printed as part of the record, pursuant to Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, but any and all may be considered in their original form. Many of said exhibits consist of memoranda, correspondence, escrow instructions, deeds, patents and other docu-

ments which would be costly to print and can better be observed in their original form.

All parties may quote or reproduce said exhibits, or any portions thereof, in their respective briefs or in the appendices thereto.

Dated: October 3, 1958.

WARREN E. SLAUGHTER,
VAUGHAN, BRANDLIN &
BAGGOT,

By /s/ THOMAS G. BAGGOT,
Attorneys for Appellant.

IRL DAVIS BRETT,

/s/ IRL D. BRETT,
Attorney for Appellees.

[Endorsed]: Filed October 4, 1958.